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No. 307

In the Supreme Court of the United States

October Term, 1964

RETAIL CLERKS UNION 1059, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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739-147—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 207

RETAIL CLERKS UNION 1550, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–12a) is reported at 330 F. 2d 210. The Board's decision and order (J.A. 388–395) [1] are reported at 141 NLRB 564.

JURISDICTION

The decision of the court of appeals (Pet. 1a–12a) was entered on January 23, 1964. On April 9, 1964, the Chief Justice extended the time for filing a peti-

[1] "J.A." references are to those portions of the record printed for the court below. "J.A. Vol. 2" references are to a volume of exhibits filed in the court below.

tion for a writ of certiorari to and including June 21, 1964, which was a Sunday. The petition was filed on Monday, June 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the parties involved in bargaining on a multi-employer basis established the practice of reserving certain subjects for individual negotiation, and that one of the parties (Kroger) properly invoked that prerogative in this case.

2. Whether, in the circumstances of this case, the Board properly concluded that Kroger's reservation of the right of individual negotiation on the subject of pensions did not violate Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B to the petition (Pet. 1b).

STATEMENT

This case involves an unfair-labor-practice charge against the Kroger Company, a food retailing chain, growing out of Kroger's failure to execute a collective-bargaining agreement between the Union and a group of food retailers assertedly linked with Kroger in a multi-employer bargaining unit. The Board found that Kroger had not violated the Act and the

court of appeals affirmed. The following facts were found by the Board and are undisputed.

Retail Clerks Union, Locals 1550, 1540, 1504, 1453, and 98 represent employees of various grocery stores in the Chicago, Illinois, area (J.A. 389; 64-65).[2] Since 1945, Kroger Company, Atlantic & Pacific Tea Company, National Tea Company and Associated Food Retailers,[3] an association of independently owned food stores, have bargained with these local unions on a group basis. The employers, however, have no formal association, constitution, rules of procedure, dues or fees, nor have they formally designated any committee, sub-group or individual to bargain for them (J.A. 389; 97–99). Between 1945 and 1954, the procedure was for the Union to submit contract proposals to the individual employers whose representatives thereafter met as a group with the Union (J.A. 389; 116). The employer representatives "agreed as to what the response [to Union proposals] would be" (J.A. 389; 116). In 1954, because of the growing size of the employer group, Marvin Saunders, a Kroger representative, informally assumed the role of employer spokesman (J.A. 389; 96, 99–100, 116–117).

Until 1961, when the events relating to this case occurred, these multi-employer bargaining sessions resulted in the signing of separate, but substantially

[2] All of the local unions except Local 1460 are members of Retail Clerks Chicago Area Council, District 3; Local 1460 is a Gary, Indiana, Local (J.A. 389, n. 2; 8).

[3] In 1955, Eagle-Piggly Wiggly, and in 1961, Red Owl Stores, joined the group (J.A. 389, n. 2; 10–11, 42, 98).

similar, contracts between the various local unions and the individual employers (J.A. 389; J.A. Vol. 2, *passim*). Nevertheless, on at least thirteen occasions between 1952 and 1961, individual employers and the local unions representing their employees negotiated separately about matters covered by the multi-employer contract in light of special circumstances relating to less than all the members of the employer group. On all but two of these occasions, these individual negotiations resulted in modifications of the multi-employer contract pertaining only to particular employers and not to the entire group. Kroger was involved in seven of these separate negotiations, which are described in detail in the Board's opinion (J.A. 391–393).

In the fall of 1961, the Union, according to past practice, served separate notices of contract reopening upon the employers (J.A. 390; 19). The first negotiating session was held on October 26, 1961. Representatives of each of the employers were present (J.A. 390; 46). At this meeting, the Union proposed the inclusion of a pension provision in the contract; prior to this time, pensions had never been included in collective bargaining negotiations (J.A. 390; 46–47). Marvin Saunders, a Kroger official and spokesman for the employer group, immediately informed the Union that neither Kroger nor A & P, both of which had pension plans of their own for their employees, would be interested in any such jointly administered

plan (*ibid.*).[4] Throughout the following ten sessions (from November 11, 1961, to February 16, 1962), both sides continued to bargain but remained firm concerning the pension plan; the employers' proposals contained no pension provisions, while the Union continued to demand such a plan (J.A. 390; 38–50, 52).

At the eighth meeting, on February 7, 1962, Kroger representative Van Ausdall reiterated to Union representative Morris that Kroger's position with respect to pensions had not changed since the first meeting (J.A. 123, 142–143). At the twelfth session, on February 22, Joseph Quirk of National Tea Company, who had replaced Saunders as spokesman for the employers (J.A. 100, 121, 132), informed the Union that all the employers were willing to grant certain wage adjustments but that some were unwilling to agree to a pension plan (J.A. 390; 82, 128). The Union replied that its position was that each employer in the group would be bound by any agreement reached (J.A. 390; 88, 125). Quirk expressed his disagreement with this proposition and suggested that the Union inform the Kroger representative, who was not present at that meeting, of its views (J.A. 390; 82, 125). At the next meeting, on February 24, Kroger representative Van Ausdall announced that neither Quirk nor any other employer representative

[4] Kroger's nationwide retirement plan, established in 1947, was supplemented in 1951 by a profit-sharing plan. According to the terms of Kroger's plan, participation by an employee in any other group pension plan would result in the automatic exclusion of that employee from the Kroger plan (J.A. 90–91, 92–95).

was authorized to accept any agreement on Kroger's behalf which included a pension proposal and that Kroger would be bound only by an agreement to which it specifically assented (J.A. 390; 82, 88, 125–126, 142). Van Ausdall then left the meeting (J.A. 126).

Later that day, the other employers reached agreement with the Union on a contract containing a pension-plan provision (J.A. 390; 82–84). When so informed, Van Ausdall stated to the meeting that Kroger would not sign the contract as written, that it would agree to the entire contract excluding the pension provision, and that it was willing to meet with the Union, if further negotiations were necessary, to try to complete an agreement (J.A. 390; 83, 127–128). On April 12, all the employers in the group, with the exception of Kroger, signed contracts with the Union (J.A. 390; 68–69, 86).

Following the February 24 meeting, Kroger and the Union negotiated separately, but no agreement was reached.[5] On March 8, the Union filed charges with the Board, alleging that Kroger violated its bargaining obligation under the Act in refusing to sign the contract agreed to by the other employers. On April 19, it struck Kroger (J.A. 390, 396; 70).

On the basis of the foregoing, the Board found that, "during the 1961 negotiations Respondent [Kroger] made clear from the outset that it would not agree to a pension plan even if the other employers

[5] Meetings between Kroger representatives and Union officials were held on March 5, April 18, and May 3; the latter two meetings were held under the auspices of the Federal Mediation and Conciliation Service (J.A. 129–130).

did so agree. As the Trial Examiner found, this position was asserted in good faith." The Board further found that the other employers, in agreeing to a pension plan, "expressly disclaimed any authority to bind Respondent." In light of the prior history showing numerous individual variances in the jointly negotiated agreement, the Board concluded that "in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties." By insisting upon separate negotiation of the pension issue, Kroger "exercised a prerogative established by past practice and did not therefore refuse to bargain in violation of Section 8(a) (5) and (1) of the Act." (J.A. 394–395.)

The court of appeals found that there was substantial evidence to support the Board's findings that the parties understood that the group bargaining did not contemplate contract uniformity under all circumstances, and that Kroger had clearly indicated to the Union that it wanted to reserve the issue of pensions for separate negotiation. Approving the Board's conclusion that, in these circumstances, Kroger's refusal to sign the contract agreed to by the other employers did not constitute a violation of the Act's bargaining requirements, the court affirmed the Board's dismissal of the complaint (Pet. 1a–12a).

ARGUMENT

The decision below turns on its particular facts, is correct, and is not in conflict with the decision of any circuit. There is no occasion for further review.

1. Petitioners challenge (Pet. 12–15) the Board's conclusions (1) "that in jointly negotiating for a collective-bargaining agreement the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties" (J.A. 394), and (2) that Kroger invoked this prerogative with respect to pensions in this case in a clear and timely fashion. This challenge raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

In addition, substantial evidence supports both of these findings. As the court below pointed out, in light of the thirteen instances of individual negotiation in the past, "the assumptions common to both [parties] must have been that, although brought together by a joint interest in uniformity, neither group marched as latter-day musketeers bound by irretrievable pledges of solidarity. All sought as much uniformity as possible, but their ideal in this regard was relative, not absolute." (Pet. 7a.) The court added with respect to the 1961 negotiations that at "the very first negotiating session, the Kroger representative stated clearly and emphatically that Kroger, because it had its own plan in effect for years, would not agree to the setting up of a new and jointly administered plan," and that "Kroger never wavered from this position, which the Board found to have been taken in good faith and not for mere trading purposes" (Pet. 9a).

2. Petitioners further contend (Pet. 8–12) that, even if Kroger made clear at the outset of the 1961 negotiations its intention not to be bound by any group agreement on pensions, such a reservation is incompatible with the principle of multi-employer bargaining and hence should be treated as a legal nullity. This contention likewise does not warrant review. As the court below stated (Pet. 11a), "group activity in the collective bargaining field has no statutory matrix by which the contours of the resulting rights and obligations can be deductively defined." Thus, the question whether certain conduct by an individual employer is inconsistent with the principle of multi-employer bargaining has properly been left largely to case-by-case determination. The Board has not hesitated to find the Act violated when the multi-employer unit has in fact been used by an employer as a means to avoid the Act's obligation to bargain in good faith.[6] The Board and the court of appeals, however, properly found that Kroger had not done so here, in insisting on individual bargaining over pensions with the Union.

Petitioners assert (Pet. 11–12, and n. 7) that, to permit the members of a multi-employer bargaining unit to negotiate provisions which deviate from the group agreement, might hypothetically give rise to a

[6] See the cases cited by the court of appeals (Pet. 11a).

number of difficult legal problems.[7] None of the problems mentioned is present in this case, which should therefore not be the occasion for their wholly abstract consideration.

3. The cases relied upon by petitioners are not in conflict, since they have important factual distinctions. In *Pacific Coast Association of Pulp and Paper Manufacturers* v. *National Labor Relations Board,* 304 F. 2d 760 (C.A. 9) (Pet. 14), the association representing the employer group in multi-employer bargaining was, unlike the informal group in this case, a formal organization with explicit, formal authority to bargain on behalf of its members on all mandatory subjects of collective bargaining and, upon a vote of a majority of its members, to bind all of them to the agreements reached between the association and the union. 133 N.L.R.B. 690, 697. Nevertheless, the association refused to bargain about

[7] Thus, petitioners suggest that, although a strike against one member of a multi-employer unit ordinarily privileges the other members in locking out to defend the integrity of the unit against the whipsawing effect of the strike (*National Labor Relations Board* v. *Truck Drivers Local No. 449* (Buffalo Linen), 353 U.S. 87), the justification for the lockout would appear to disappear where the strike is over an item which has been withdrawn from the group bargaining (Pet. 11). Whether this is so need not be determined here, for none of the nonstruck employers resorted to a lockout. Similarly, petitioners inquire whether, in the circumstances of this case, the Union would have been guilty of a refusal to bargain had Kroger demanded that it execute the group agreement without a pension provision, and it had refused (Pet. 11, n. 7). Kroger made no such demand here, and no refusal to bargain charge was filed against the Union.

pensions, but insisted that all such bargaining take place on an individual level. This refusal by an authorized bargaining representative to bargain about a mandatory subject of bargaining was clearly an unfair labor practice on the part of the association absent any affirmative defense. The association defended on the ground that the union had contractually agreed with it to omit pensions from the subjects of bargaining. Both the Board and the court of appeals rejected this defense as a matter of fact. In the present case the charge is not against the informal employer group but against Kroger, a member of the group. Unlike the association in *Pacific Coast*, Kroger has offered to bargain with the Union about pensions and the Board and court of appeals have found on the basis of substantial evidence that by insisting upon individual rather than group bargaining Kroger has not, in light of all the circumstances, been guilty of refusing to bargain in good faith.

In *Anderson Lithograph Co.*, 124 NLRB 920, enforced *sub nom. National Labor Relations Board* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (C.A. 9) (Pet. 10), the charge was, as here, against an individual employer. The employer, however, unlike Kroger in this case, failed to communicate in timely fashion its desire to reserve a particular subject for individual action. Finally, *National Labor Relations Board* v. *Brown*, pending on writ of certiorari, No. 7, this Term (Pet. 15), involves the totally different question whether the nonstruck members of a multi-employer unit exceed the limits of defense permitted by

National Labor Relations Board v. *Truck Drivers Local No. 449* (Buffalo Linen), 353 U.S. 87, when, after having locked out their employees, they resume operations with temporary replacements for their regular employees who are willing and able to work.

CONCLUSION

For the above stated reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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